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No. 88-1864

In the Supreme Court of the United States

OCTOBER TERM, 1989

WILLIAM J. KELLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in upholding the district court's refusal to give a tendered defense instruction on reliance on the advice of counsel under the facts of this tax fraud case.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is reported at 864 F.2d 569.

JURISDICTION

The judgment of the court of appeals was entered on January 10, 1989. A petition for rehearing was denied on March 15, 1989 (Pet. App. A15). The petition for a writ of certiorari was filed on May 15, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Indiana, petitioner was convicted on one count of willfully filing a false individual income tax return, in violation of 26 U.S.C. 7206(1), and on

eight counts of willfully assisting others to file false income tax returns, in violation of 26 U.S.C. 7206(2). Pet. App. A1. Petitioner was sentenced to imprisonment for a total of 24 months, with all but four months suspended, and he was fined $5,000. Gov't C.A. Br. 2-3.

Petitioner owned Financial Consultants of Indiana, Inc., a firm that served as financial adviser to numerous professional clients. He was one of several promoters of a tax shelter investment known as Stephen Mandarano Fine Arts, Ltd. (SMFA). Investors in the tax shelter bought original lithographic plates from SMFA, along with the rights to the lithographic prints made from the plates and the photographic reproductions of the prints. The investors paid between $12,500 and $18,500 in cash for the plates and the rights to the prints, and they signed promissory notes for the balance of $155,000 to $238,000. The SMFA offering memorandum represented that the promissory notes were in part recourse and in part non-recourse notes: the investor was personally liable for about one-third of the note amount, while the remainder of the debt was secured only by the sale of prints and reproductions. The offering memorandum also advised that investors could claim depreciation deductions against the cash payment and the recourse portion of the note each year for seven years following the initial investment. Deductions were not allowable for the non-recourse portion, because 26 U.S.C. 465 provides that an investor is entitled to depreciation deductions only for the portion of investment financing that is at risk. Pet. App. A2-A3.

SMFA provided each investor with a "side letter agreement" that effectively negated the investor's personal liability on the recourse portion of the notes. The letter assured the investor that SMFA would provide a credit for unsold artwork to be applied against the recourse portion of the note. The letter also stated that SMFA would never

seek any further monies from investors. The letter therefore made the planned deductions for the "recourse" portion of the notes illegal since the investors were not actually at risk for that portion of the investment. Pet. App. A2-A3.

In 1979, petitioner purchased an SMFA tax shelter for himself and sold the shelter to at least six of his clients. In attendance at each closing were the investor; Alan Bernstein, a representative of SMFA; Alfred Brown, a lawyer and a promoter of the shelter, or another lawyer from his firm; and either petitioner or his associate. Brown testified that at the closings investors were told that they should keep the side letter agreement in a safe place and that they should avoid showing it to the IRS if they were audited, because otherwise "the tax shelter itself might be in question." Pet. App. A3. He further testified that on some occasions petitioner himself "told the client to keep the side letter agreement 'in a safe place' and not show it to the IRS." *Id.* at A6.

Alfred Brown, his associate Steven Goldstein, and Alan Bernstein of SMFA each pleaded guilty to one count of aiding and assisting in the filing of a false tax return in violation of 26 U.S.C. 7206(2). Pet. App. A3. Petitioner went to trial and contended, inter alia, that he had relied in good faith on the advice of counsel. He testified that attorney Alfred Brown had introduced the SMFA tax shelter to him, had recommended it as a "superior" investment, and had never told him that the side letter agreement rendered tax shelter deductions illegal. Pet. App. A4. Petitioner requested an instruction spelling out that defense.[1] The trial court refused to give the instruction.

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[1] Petitioner's proposed instruction read as follows: "If you find that attorney Alfred Brown was fully informed of all relevant facts and advised William J. Kelley that the Stephen Mandarano Fine Arts tax

On appeal, petitioner contended that the court erred in refusing to give his requested "advice of counsel" instruction.[2] The court of appeals disagreed. It first found the existence of an evidentiary foundation for the instruction to be "questionable." Pet. App. A5. It went on to hold that, assuming an evidentiary foundation, petitioner's reliance on counsel theory was adequately encompassed by instructions that the district court had given the jury requiring it to find that petitioner had acted willfully and knowingly. *Id.* at A6.

ARGUMENT

Petitioner contends (Pet. 7-20) that the court of appeals erred in holding that the trial court's instructions on willfulness encompassed his requested instruction on good-faith reliance on the advice of counsel. Review of this issue is not warranted. While the court of appeals charitably characterized the evidentiary foundation for the tendered instruction as "questionable" (Pet. App. A5), the factors to which it pointed establish that there was no evidentiary foundation for the instruction.

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deductions were lawful and proper, and if you find that William J. Kelley relied on that advice, then you may use that as a factor in assessing William J. Kelley's good faith or lack of intent to violate the tax laws." Pet. App. A4.

[2] Petitioner also contended that (1) the district court had erred in admitting certain statements into evidence pursuant to Fed. R. Evid. 801(d)(2)(E); (2) the district court had erred in declining to dismiss the indictment under 26 U.S.C. 7206(2) on the ground that the charges were barred by the statute of limitations; (3) there was insufficient evidence to support the conviction; (4) the district court erred in admitting an exhibit into evidence; and (5) the district court erred in refusing to give a requested instruction on First Amendment protection of advocacy. These contentions are not raised in the petition.

A defendant is not entitled to an instruction on a theory of defense unless he has presented evidence on each element of the defense. See *United States* v. *Bailey*, 444 U.S. 394, 415 (1980). The elements of a valid "advice of counsel" defense are (1) that the defendant honestly and in good faith sought the advice of a competent lawyer, (2) that he made full disclosure of all pertinent facts to the lawyer, and (3) that he followed the advice of the lawyer in good faith, relying on it and believing it to be correct. *Williamson* v. *United States*, 207 U.S. 425, 453 (1908); *United States* v. *Farber*, 630 F.2d 569, 572 (8th Cir. 1980), cert. denied, 449 U.S. 1127 (1981); *United States* v. *Fruehauf Corp.*, 577 F.2d 1038, 1068-1069 (6th Cir.), cert. denied, 439 U.S. 953 (1978); *Bisno* v. *United States*, 299 F.2d 711, 720 (9th Cir. 1961), cert. denied, 370 U.S. 952 (1962).

At trial, petitioner admitted (and Brown likewise testified) that petitioner did not retain Brown for legal advice on the SMFA investment. Moreover, the evidence showed that while Brown did not tell petitioner that the tax shelter deductions were illegal, he likewise did not tell petitioner that they were legal. Brown's statement that the SMFA shelter was "superior" meant only that it was more profitable than another investment he and petitioner had discussed, as the court of appeals noted. Pet. App. A5. Brown testified that it was apparent at the closings that petitioner (who was, after all, the owner of a financial consulting firm) was familiar with the tax problem caused by the side letter agreement. Indeed, Brown testified that petitioner himself told some of the clients not to show the side letter agreement to the IRS. *Id.* at A5-A6. In short, there was no evidence of good faith reliance by petitioner on legal advice sought and obtained from Brown. Rather, the evidence established that petitioner knew that the tax shelter deductions were illegal because of the side letter

agreements and that he and Brown were co-conspirators in a scheme to defraud the government. Thus, there was no evidentiary foundation for the instruction tendered by petitioner, and the trial court properly refused to give it.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3] Where there is an evidentiary basis for a defense of reliance on the advice of counsel or a professional tax preparer, courts of appeals have held that an instruction such as the one proposed by petitioner should be given. See *United States* v. *Duncan*, 850 F.2d 1104 (6th Cir. 1988); *United States* v. *Mitchell*, 495 F.2d 285 (4th Cir. 1974); *Bursten* v. *United States*, 395 F.2d 976 (5th Cir. 1968), cert. denied, 409 U.S. 843 (1972). But any error on that score would be harmless under the facts of this case because, as the court of appeals concluded (Pet. App. A6), the instructions, viewed as a whole, did not allow the jury to convict petitioner if it concluded that he had reasonably relied on the advice of counsel. The trial court instructed the jury that, in order to convict, it had to find that petitioner acted knowingly and willfully. It defined "knowingly" to preclude conviction if petitioner had violated the law ignorantly, mistakenly, or accidentally. It defined "willfully" as " 'voluntarily and intentionally with the purpose of avoiding a known legal duty' " (*ibid.*). The jury could not have convicted petitioner under these instructions if it thought that petitioner had somehow relied in good faith on Brown's legal advice. In that event, the jury would have concluded that he had not intentionally violated the law, but had done so mistakenly.

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